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# In the Supreme Court of the United States

A. NEIL CLARK, FIELD OFFICE DIRECTOR, SEATTLE, WASHINGTON, IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL., PETITIONERS

*v.*

SERGIO SUAREZ MARTINEZ

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

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A. NEIL CLARK, FIELD OFFICE DIRECTOR, SEATTLE, WASHINGTON, IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL., PETITIONERS

*v.*

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# REPLY BRIEF FOR THE PETITIONERS

Respondent's and his amici's arguments fail because they would effectively interpose a six-month expiration date on the Political Branches' exercise of their historic and vital power to exclude aliens, and because they take no account of the proven reality that release under supervisory conditions has not worked for respondent and the other aliens whose cases are pending before this Court (see U.S. Br. 10-11 n.6). The very essence of exclusion is the capacity to keep an alien physically out of and separated from the American community. Here, the Political Branches have made the quintessentially political decision that a recidivist criminal alien dispatched to American shores by a hostile foreign government cannot safely or appropriately be released into the country. When, as here, that hostile government refuses to repatriate its citizen, the *only* mechanism for the Political Branches to enforce their sovereign prerogative of exclusion and to counter foreign manipulation and the threat to domestic safety is to detain the alien. There is no other way.

## A. *Mezei*, Not *Zadvydas*, Informs The Proper Resolution Of This Case

Respondent first argues (Br. 19-23) that *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), forecloses the detention beyond six months of aliens stopped at the border, and that principles of *stare decisis* compel adherence to controlling precedent. Respondent is half right. This Court has directly addressed the government's power to continue to exclude—to detain—an alien who was stopped at the border and who

cannot be repatriated. That controlling precedent, however, is not *Zadvydas*, which expressly and repeatedly distinguished the question presented here. See 533 U.S. at 682, 693-696. It is *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). Here, as in *Mezei*, "[t]he issue is whether the Attorney General's [now, Secretary's] continued exclusion" of an alien who could not be repatriated "amount[ed] to an unlawful detention, so that courts may admit him temporarily to the United States on bond until arrangements are made for his departure abroad." 345 U.S. at 207. This Court held that the government's "continued exclusion" (*id.* at 207, 215)—indefinite detention—of Mezei did not "deprive[] him of any statutory or constitutional right" (*id.* at 215), given the government's historically comprehensive power over excluded aliens (*id.* at 212). The Court did so, moreover, on the basis of statutory text that lacked any explicit authorization for indefinite detention (see *id.* at 210 n.7; cf. *Zadvydas*, 533 U.S. at 697), and notwithstanding Mezei's physical presence within the United States (345 U.S. at 215), or his 25-year stay in the United States (*id.* at 208).

Respondent attempts to distinguish *Mezei* on five grounds, none of which succeeds. First, respondent argues (Br. 40) that *Mezei* involved only the power of "exclusion without hearing in certain *security cases*." But the language respondent quotes from *Mezei* is the Court's description of its earlier holding in *Kwong Hai Chew* v. *Colding*, 344 U.S. 590 (1953), a case that, the Court explained in the very next sentence, "drastically differs" from Mezei's, because Kwong Hai Chew was a resident alien. *Mezei*, 345 U.S. at 214. Beyond that, while the Court referred to the fact that Mezei was denied entry as a security threat to explain why Congress might have chosen to exclude him, *id.* at 208, the Court's categorical holding concerning the broad power of the government over aliens "on the threshold of initial entry," *id.* at 212, relied entirely on extant precedent governing the Political Branches' comprehensive control over excluded aliens. Those cases made clear that "[Mezei's] right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate." *Id.* at 216.



Second, respondent insists (Br. 40) that *Mezei* implicated the Executive Branch's unique authority during "*periods of international tension and strife*." That is not a difference. See *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633, 2648 (2004) (plurality opinion of O'Connor, J.). The ongoing war in Iraq, military operations in Afghanistan, and vigorous efforts to protect the Nation against further terrorist assaults only underscore the importance of preserving the Political Branches' control over the borders and their capacity to prevent the insinuation of dangerous aliens into American society. And, of course, the hostility of the Castro regime toward the United States, which has resulted in the periodic instigation of migration crises (including the one that brought respondent to our shores), continues unabated.

In any event, every and "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Demore* v. *Kim*, 538 U.S. 510, 522 (2003) (quoting *Mathews* v. *Diaz*, 426 U.S. 67, 81 n.17 (1976), and *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952)). As this Court has recognized, the judiciary is "ill equipped" to attempt, on a case-by-case basis, "to determine the[] authenticity and utterly unable to assess the[] adequacy" of those foreign policy objectives or the Political Branches' implementation of them. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999).

Third, respondent argues (Br. 41) that Mezei sought actual admission into the United States, not release under supervisory conditions. That is wrong. See *Mezei*, 345 U.S. at 207 ("The issue is whether * * * courts may admit him

temporarily to the United States on bond until arrangements are made for his departure abroad."); see *id.* at 209 (issue is whether "respondent's 'confinement' [is] no longer justifiable as a means of removal elsewhere").

Fourth, respondent contends (Br. 42) that *Mezei* involved "an arriving rather than a departing alien," and thus addressed the government's effort to "prevent entry" as opposed to the "procedures necessary to remove a person already in the United States." That too is wrong. The defining dilemma of both respondent's case and Mezei's is that they can neither come nor go. Both Mezei and respondent were denied entry upon arrival; both were physically within United States territory, rather than left sitting at the border; both were subjected to administrative proceedings that resulted in final orders denying admission and ordering their departure; for both, "all attempts to effect respondent's *departure* have failed," 345 U.S. at 208 (emphasis added); and for both, the issue for the Court is the lawfulness of "continued exclusion"—detention—until "*departure* abroad" can be achieved (*id.* at 207) (emphasis added).[1]

Fifth, respondent insists (Br. 42) that a judicial order releasing him into the United States would not "implicate the Political Branches' plenary powers over expulsion or exclusion." This Court certainly thought otherwise in *Zadvydas*, when it explained that Zadvydas' previous admission to the United States for permanent residence made it unnecessary "to consider the political branches' authority to control entry into the United States" in the first instance. 533 U.S. at 695.

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[1] Respondent (Br. 42) and his amici (Nat'l Refugee Orgs. Br. 5, 7) decry "hyper-technical reliance" on the "entry-fiction"—the notion that an alien's parole and physical presence have no effect on his status as an applicant for admission. But that treatment is a statutory command. See 8 U.S.C. 1182(d)(5)(A) (upon termination of parole, an alien's "case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States").



By contrast, a decision by the Court compelling respondent's release into American society would entail a direct judicial confrontation with and erosion of the Political Branches' joint control of the borders and management of a foreign policy crisis. That is because (i) respondent was apprehended at the border (ii) through the concerted application of law enforcement resources by the Executive Branch, (iii) in response to a migration crisis and a "state of emergency in south Florida" (Nat'l Refugee Orgs. Br. 11), (iv) that was deliberately instigated by a hostile foreign government, (v) as a foreign policy ploy, (vi) to wring foreign policy concessions from the United States, (vii) in part, by sending violent criminals onto American shores. See U.S. Br. 39-40. Congress and the Executive Branch responded to that foreign policy crisis through use of the Attorney General's parole authority, 8 U.S.C. 1182(d)(5)(A) (Supp. IV 1980), and through the passage of legislation offering the Mariel Cubans a special opportunity to become lawful permanent residents and ultimately citizens. To ensure that Castro's foreign policy machinations did not endanger the safety of the American public, Congress and the Executive Branch conditioned parole and adjustment of status on the aliens' willingness to lead law-abiding lives. See U.S. Br. 7-8.

Respondent thus seeks a judicial command to release onto American streets those individuals whom the Political Branches intercepted at the border during a migration crisis, who have spurned the United States' offers of parole and adjustment, and who have endangered the lives, health, and property of Americans by engaging in repeated felonies. Such an order would countermand the Political Branches' handling of an international crisis, would preclude the government from speaking with one voice in its response to the Cuban Government, and would put Americans at a heightened risk of repeated criminal victimization by Cuba's own nationals—the very ones Castro has refused to take back. Importantly, respondent does not deny that he and the other

aliens pose a very real risk to public safety. He simply contends (Br. 43) that the risk must be tolerated because the government can incarcerate excluded aliens for their crimes *after* they are committed. That argument misses the point. The successful management of foreign relations and national security seeks to prevent the harms that foreign powers or foreign persons would inflict on Americans *before* they are fully realized.

Calling it "release on supervision" rather than "re-parole" (Resp. Br. 43 n.19) does not change anything. Respondent is simply engaging in word games. See *Black's Law Dictionary* 1006 (5th ed. 1979) (defining "parole" as a "conditional release * * * generally under supervision"). The end result —release onto American streets—is the same. The only difference is that parole is ordered by the Executive Branch, which Congress has charged with such release decisions, 8 U.S.C. 1182(d)(5)(A), only when the Executive concludes that release will not endanger the public's safety or foreign relations. The release that respondent seeks, by contrast, would be compelled by the Judicial Branch over the public safety and foreign policy objections of the Political Branches. Therein lies the affront to the separation of powers.

Unable to distinguish *Mezei*, respondent ultimately argues (Br. 44-46) that it is no longer good law. But respondent does not cite a single decision of this Court in the half-century since *Mezei* was decided that calls into question the fundamental distinction in immigration law and in the Constitution between aliens stopped at the border and those who have entered. *Zadvydas* reaffirmed it. 533 U.S. at 693. Indeed, for "constitutional purposes," those legal distinctions "made all the difference" in *Zadvydas*. *Ibid.* Even Justices Jackson and Frankfurter, dissenting in *Mezei*, agreed that Mezei had no substantive due process right not to be subject to indefinite detention. 345 U.S. at 224. The cases that respondent cites (Br. 44-46) confirm the continuing vitality of



the distinction between aliens stopped at the border and those who have entered, because they involve the due process rights of United States citizens (see *Hamdi*, *supra*), lawful permanent residents (*e.g.*, *Kim*, *supra*; *Kwong Hai Chew*, *supra*; *Landon* v. *Plasencia*, 459 U.S. 21 (1982)), or the children of aliens who entered the United States illegally (see *Plyler* v. *Doe*, 457 U.S. 202 (1982)).[2]

**B. The Statutory Text And Structure Confirm The Secretary's Power To Detain Excluded Criminal Aliens**

1. Although respondent argues (Br. 17-23) that the "plain" text of 8 U.S.C. 1231(a)(6) subjects the detention of excluded aliens to a presumptive six-month time cap, one scours the statute in vain for any such words of limitation. The text of Section 1231(a)(6) provides in unqualified terms that excluded aliens "may be detained beyond the removal period." 8 U.S.C. 1231(a)(6). That language "suggests discretion" and "literally" sets no time limit on the detention of excluded aliens who cannot be removed. *Zadvydas*, 533 U.S. at 689, 697. Indeed, the Court in *Zadvydas* acknowl-

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[2] Respondent's assertion (Br. 35) that *Plyler* addressed the constitutional rights of excluded aliens paroled into the United States is wrong. See 457 U.S. at 213 n.12 ("[T]he undocumented children who are appellees here * * * could apparently be removed from the country only pursuant to deportation proceedings."). Respondent's reliance (Br. 44) on a case that preceded *Mezei* by nearly 50 years—*Chin Yow* v. *United States*, 208 U.S. 8 (1908)—is equally unavailing, because the narrow question presented in that case "was whether the petitioner was a citizen of the United States before he sought admission." *Tod* v. *Waldman*, 266 U.S. 113, 119 (1924), as modified, 266 U.S. 547 (1925). *Rasul* v. *Bush*, 124 S. Ct. 2686 (2004), is even further afield, because that case decided only the statutory question of whether persons forcibly brought by the United States to territory within its plenary and exclusive jurisidction could bring a habeas corpus action to challenge their detention. *Id.* at 2693, 2699. The Court did not decide that alien combatants have any cognizable statutory or constitutional rights, much less a right to be released into the United States. The United States does not dispute that respondent could bring a habeas corpus action to review his detention. See *Mezei*, 345 U.S. at 213.

edged that its presumptive cap on the detention of former lawful permanent residents was the product of judicial inference, undertaken in the absence of "clearer terms" authorizing the long-term detention of a class of aliens who have long enjoyed significant due process protections. *Id.* at 697.

Those "clearer terms" are present, and the countervailing constitutional concerns are absent, for aliens stopped at the border. Section 1182(d)(5)(A) of Title 8 expressly empowers the Secretary, "in his discretion," to "parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States." That Section further provides that, "when the purposes of such parole shall, in the opinion of the [Secretary], have been served the alien shall forthwith return or be returned to the custody from which he was paroled." The clear import of those provisions is that, for aliens stopped at the border, detention is the starting premise and the background norm, and release on parole is a discretionary "act of extraordinary sovereign generosity." *Jean* v. *Nelson*, 727 F.2d 957, 964 (11th Cir. 1984) (en banc), aff'd, 472 U.S. 846 (1985). Congress specifically preserved that broad discretion in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, when it carried the parole authority forward without modification, even though Congress was aware of the long-term detention of the Mariel Cubans. See U.S. Br. 31-32.

Respondent insists (Br. 27-28) that the parole provision is irrelevant because Section 1231(a)(6) governs post-removal-order detention. But respondent's detention, unlike the former lawful permanent residents' in *Zadvydas*, is not merely auxiliary to or in aid of removal. It is the act of exclusion itself. For aliens like respondent, who cannot be safely released on parole, detention is the only means by which the United States can exercise its inherent and uncontested



power to keep them out and to protect American society from them. The removal order enforces that exclusion decision. It does not supplant it. Respondent's detention is thus as much a product of his parole revocation as it is of the entry of a removal order.

In any event, this Court "construe[s] statutes, not isolated provisions." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 568 (1995). The authorization to detain excluded aliens pending their removal in Section 1231(a)(6) thus must be read *in pari materia* with Section 1182's background presumption and authorization of detention for excluded aliens. Construing Section 1231(a)(6) to afford aliens who have been denied any relief from exclusion and ordered removed based on crimes committed within the United States a greater right to release than arriving aliens who pose no discernible risk to public safety would be absurd, especially since Section 1231(a)(6) was added by IIRIRA, a statute designed to enhance the Executive Branch's capacity to remove criminal aliens from the United States (see U.S. Br. 30-31).

2. Respondent further contends (Br. 18-19) that Congress "unequivocally answered the question" whether excluded aliens should be subjected to the presumptive time limit this Court adopted in *Zadvydas* because Congress collocated both aliens stopped at the border and those who have entered as the "grammatical subject" of Section 1231(a)(6), and subjected both groups "to the same predicate—the detention provision this Court construed in *Zadvydas*." But that common predicate is "may be detained." 8 U.S.C. 1231(a)(6). The word "may" is an authorization of executive action and an express grant of power that connotes discretion and flexibility based on context. Whatever implicit restrictions on that grant of authority may exist in the context of aliens who enjoy constitutional protections, they

should not be extended to what the Court itself has recognized is a wholly different class of aliens.[3]

Respondent's argument suffers from an even more fundamental flaw, because it would require the Court to conclude two things, neither of which is plausible. First, respondent's argument assumes that, through the mere act of listing different classes of aliens seriatim at the beginning of Section 1231(a)(6)'s grant of authority, Congress surrendered the Political Branches' historic and comprehensive power over aliens stopped at the border.[4] Second, respondent's argument assumes that Congress intended to enhance significantly the rights and protections afforded those excluded aliens who have proven themselves least deserving of this country's hospitality—those whose crimes against Americans have rendered them ineligible for any relief from exclusion and have given rise to a final order of removal. But "Congress is unlikely to intend any radical departures from past practice without making a point of saying so." *Jones* v. *United States*, 526 U.S. 227, 234 (1999). "Especially is this so where the construction contended for purports to raise a serious constitutional question as to the role of the judiciary under the doctrine of separation of powers," *Ullman* v. *United* States, 350 U.S. 422, 433 (1956), by weakening the Political Branches' control over the Nation's borders, foreign policy, and national security.

3. Respondent next insists (Br. 21-22) that, statutory text and purpose aside, once the operation of statutory language in one context necessitates application of the constitutional avoidance canon, that construction must forthwith govern all applications of the statute. Respondent cites no authority from this Court for that proposition. In fact, variation in the operation of statutory terms in immigration law, based on the characteristics and status of aliens, is commonplace. See, *e.g.*, *Reno* v. *Flores*, 507 U.S. 292 (1993) (the same words in a single statutory provision providing that the Attorney General "may" detain an alien, see 8 U.S.C. 1252(a)(1) (1982), supported different release rules for juvenile aliens and adults). That same result occurs when constitutional considerations compel a narrow construction of a statutory term only in specialized contexts. See U.S. Br. 29 & n.14 (discussing *Crowell* v. *Benson*, 285 U.S. 22 (1932), and *Lane* v. *Pena*, 518 U.S. 187 (1996)). Respondent wants more examples (Br. 21 & n.8): *Raygor* v. *Regents of the Univ. of Minn.*, 534 U.S. 533 (2002), is another. There, the Court applied the rule of constitutional doubt to conclude that the tolling provision in 28 U.S.C. 1367(d) operates differently for States than for other defendants, even though the statutory language facially embraces all such claims on equal terms. 534 U.S. at 542-546. The very next year, the Court refused to extend that same reading of statutory language to a suit against a political subdivision, because "no such constitutional doubt arises" in that context. *Jinks* v. *Richland County*, 538 U.S. 456, 466 (2003). In addition, the Court routinely interprets the term "person" to exclude States but to include municipalities, because the former implicate constitutional concerns that the latter do not. Compare, *e.g.*, *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), with *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119 (2003).

At a more basic level, respondent's argument overlooks that the foundational purpose of the doctrine of constitutional avoidance is to respect congressional judgments and to give the fullest possible effect to the laws Congress enacts.

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[3] See *Kentucky Dep't of Corrs.* v. *Thompson*, 490 U.S. 454, 464 (1989) (use of "may" following a list of "substantive predicates" "stop[s] short of requiring that a particular result is to be reached upon a finding that the substantive predicates are met"; persons within the listed groups may be treated similarly, "but they need not be").

[4] Other parts of IIRIRA evidence that Congress, in fact, carried forward the legal distinction between aliens stopped at the border and those who have entered the United States. See 8 U.S.C. 1182(d)(5), 1229c(a)(4); 8 U.S.C. 1182(a), 1227(a) (2000 & Supp. I 2001).

Reflexively extending a specialized construction of statutory language adopted in a constitutionally sensitive context to a historically, structurally, and politically distinct context, would transform the rule of constitutional avoidance from "a valuable servant, [into] a dangerous master to follow in the construction of statutes." *Ford* v. *United States*, 273 U.S. 593, 612 (1927). That is particularly true when the initial construction that avoids constitutional concerns takes the form of a judicially implied contraction of an express congressional grant of authority. Transplanting that implied restriction to a context that does not implicate the same constitutional concerns would reflect unjustified judicial lawmaking, not adherence to the constitutional avoidance doctrine.

4. Respondent (Br. 24-27) relies heavily on 8 U.S.C. 1226a(a)(6) (Supp. I 2001), which authorizes the indefinite detention of terrorist aliens whose removal is not foreseeable "for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person." That statute is of no help to respondent. First, Section 1226a was enacted five years after Section 1231(a)(6), and thus is "beside the point," because later-enacted laws "do not declare the meaning of earlier law." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 237 (1998).

Second, Section 1226a was enacted in the wake of both the *Zadvydas* decision and the September 11th terrorist attacks, which were committed by aliens who had entered the United States and thus whose detention pending removal might have been covered by *Zadvydas*. Section 1226a cabins *Zadvydas*'s scope to ensure that the Court's presumptive six-month cap on detention does not impinge on national security or "the safety of the community," 8 U.S.C. 1226a(a)(6) (Supp. I 2001). Therefore, respondent's argument that Section 1226a somehow evidences Congress's intent to expand *Zadvydas* gets it exactly backwards.



Finally, Congress's enactment of legislation that addresses security risks posed by particular individuals to the United States does nothing to address security risks that are created by the policies of foreign governments, rather than the character of individual aliens. Among those countries that have proven most reluctant to repatriate their nationals are Iran, Ethiopia, Somalia, Cuba, Vietnam, and, formerly, Iraq. Any construction of Section 1231(a)(6) that would curtail the Political Branches' ability to stop the infiltration of dangerous individuals from those countries and to prevent them from being released into American communities necessarily would affect the balance of power between the United States and those countries and would erode the Nation's ability to speak forcefully, with one voice, in such sensitive and complex foreign relations. Furthermore, even if not denominated terrorists under Section 1226a, recidivist criminals' serial acts of murder, rape, assault, and pedophilia can substantially erode community safety and stability. Foreign governments should not be able to count on the Judicial Branch releasing such criminal elements into American society after the Political Branches have intercepted them, denied them admission, determined that they are a threat to public safety, and initiated diplomatic processes to effect their return.[5]

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[5] The rule of lenity (Resp. Br. 31-32) is a tool for construing ambiguous statutory terms in statutes that create or impose punitive sanctions. The exclusion and attendant detention of aliens stopped at the border is not punishment. Even if it were, respondent had ample notice that the government could take measures, including detention, to bar his entry into the United States. Moreover, the mere existence of "grammatical possibility" does not license courts to craft extra-textual time limits on the constitutionally based power of the Political Branches to exclude aliens whose presence in the United States would threaten public safety. *Caron* v. *United States*, 524 U.S. 308, 316 (1998). Finally, the rule of lenity does not apply when, as here, "the ambiguous reading relied on is an implausible reading of the congressional purpose." *Ibid.*

### C. Preserving The Executive Branch's Detention Authority Serves Vital Purposes

Respondent largely ignores the critical interests served by preserving the Secretary's authority to detain aliens who were stopped at the border and subsequently ordered removed (*i.e.*, formally excluded) based on their criminal activities in the United States while released on discretionary parole. The basic purpose of detention for aliens stopped at the border and ordered removed is exclusion itself. The very essence of exclusion is physically stopping and preventing an individual from entering American society. When there is no avenue for sending the alien back and when his release on parole poses a threat to public safety, the only practicable means of exclusion is detention. This Court recognized as much in *Mezei* when it thrice referred to the alien's potentially indefinite detention as "continued exclusion." 345 U.S. at 207, 215.

The Secretary's grant of parole in cases in which he determines that public safety, foreign relations, and the national interest will not be compromised, conditioned on terms established and enforced by the Secretary, is consistent with exclusion because the Political Branches retain complete control over the foreign national's ability and opportunity to move within American society. But a judicially mandated release, over the express determination of the Secretary that release is contrary to the interests of the United States, bears no resemblance to the historic power of exclusion. It would take control of the excluded alien out of the hands of the Political Branches; it would deny the government the ability to prevent and preempt harms to the United States and its citizens before they happen; and it would arm hostile foreign powers with a new means of harming or threatening the interests of the United States—one that the Political Branches could not stop.



Preserving the Secretary's detention authority also ensures that the parole under 8 U.S.C. 1182(d)(5)(A) of aliens stopped at the border remains a matter of grace after they have been formally barred from the country under a final order of removal, just as it was before entry of that order. Parole should remain a benefit limited to cases where the Secretary affirmatively determines that the "public benefit" would be served, rather than undercut, by release. To read Section 1231(a)(6) as bestowing on individuals the very right to release that the Secretary withdrew based on their criminal activity—and to do so *because* the United States has arrived at a formal and definitive determination in a final order of removal that the aliens should be barred from the country—would be perverse and would frustrate the operation of the parole system. *Zadvydas* itself recognized that potential problem and provided that "the alien no doubt may be returned to custody upon a violation of those [release] conditions." 533 U.S. at 700. But, because every single Mariel Cuban currently in detention pending their removal has had his parole revoked at least once for criminal conduct, respondent can prevail only if the Court expands *Zadvydas* to cap the length of time that individuals may be *re-detained* after they have already proven themselves unwilling to adhere to reasonable release conditions.

In addition, respondent and his amici go to great lengths to paint the United States' detention—continued exclusion—of respondent as inhumane and "offend[ing] the[ir] moral values" (Religious Orgs. Br. 2). Long-term detention, however, is not something that the United States relishes. Quite the opposite, the government gave respondent and the other Mariel Cubans being detained numerous opportunities to avoid detention and to live within the United States, through parole and re-parole, the opportunity to adjust their status, and the provision of benefits under the numerous special programs chronicled by respondent's amici. See Nat'l Refugee Orgs. Br. 15-20. Respondent and the other detained

aliens chose instead to commit crimes within the country that had taken them in with "an open heart and open arms" (Resp. Br. 8). Indeed, while respondent (Br. 16, 36-37, 43) makes much of the two decades he has spent in the United States, most of that time has been spent in the American criminal justice system. In the 20 years he spent on immigration parole, respondent managed to accumulate and serve 16 1/2 years' worth of criminal sentences. U.S. Br. 9-10.

Furthermore, while respondent and his amici express great solicitude for the interests of selected detainees (Resp. Br. 10-11; Cuban Bar Br. 16-29), those are not the only interests at stake here. A genuinely humanitarian response to the dilemma of recidivist criminal aliens who cannot be readily removed must balance all the affected interests, including (i) the interests of past and prospective victims of the aliens' crimes; (ii) the lives and safety of prospective immigrants who will have a greater incentive to undertake risky migrations to the United States due to the increased prospects of release into the country if they arrive at our shores; (iii) the lives and safety of persons who might be encouraged or compelled (as Castro did in 1980) to undertake such hazardous departures as a newly revitalized tool of foreign policy; (iv) the interests of all arriving aliens, whose opportunities for parole and a humanitarian response to migration crises might have to be curtailed; and (v) the acute interest of all Americans in current times in the vigorous protection of the borders and national security against the insinuation of dangerous individuals into the United States. When *all* the relevant interests are put on the table, the "right" humanitarian response to, for example, Angel Casares' murder/manslaughter conviction and his continued physical altercations in detention (see Cuban Bar Br. 27-28) is not the one amici posit. While amici might not hesitate to put such a violent person back on the streets, nothing in the Constitution, Section 1231(a)(6), or "community and religious values" (Religious Orgs. Br. 12), requires the government to



share their optimism and to visit the substantial risk of an erroneous decision on the innocent public, rather than on the unadmitted alien who has demonstrated a persistent disregard for law and basic human decency.[6]

Finally, respondent's (Br. 32-33) and his amici's (Cuban Bar Br. 14) accusations concerning the violation of international law are more appropriately leveled at the Cuban government, which is violating international law by refusing

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[6] See *Kim*, 538 U.S. at 518-519 (noting high recidivism rates of removable criminal aliens); U.S. Br. 30-31 & n.16. It is doubtful that the communities whose residents have already been assaulted, raped, and molested by the other aliens identified in respondent's and the amici's brief or the communities into which those dangerous individuals would be released share amici's "community values" or moral imperative for release. Federal detention, immigration, and court records (copies of which will be lodged with the Clerk of the Court at the Court's request) reveal, for example, that Hector Penalver (Resp. Br. 10) had his parole revoked after committing numerous crimes of violence, including hitting a man in the head with a pipe, leaving the victim permanently disabled. While in detention, he was convicted of repeatedly stabbing another inmate with a homemade knife. Manuel Cespedes-Leon (*id.* at 11) was convicted of first-degree sodomy on an 11-year old child. Armando Areno-Aleman (*ibid.*) was convicted of three counts of raping a child under the age of 12 and four counts of sexually abusing minors. Arturo Vigil-Hernandez (*ibid.*) had his parole revoked after a conviction for lewd contact with a child under 16 (putting his penis in the mouth of a 4-year-old boy). After Jose Zayas's (*ibid.*) first parole was revoked for criminal activity, he was re-paroled and then committed attempted rape in the first degree while armed with a deadly weapon. While in detention, he has received approximately 26 citations for fighting, assault, destruction of property, and refusing to obey orders. Enrique Acosta Delgado (Cuban Bar Br. 19) was convicted of a violent assault with a handgun and trafficking more than 10,000 pounds of marijuana. When the government offered him a second chance, he ran away from the halfway house and later was convicted of possession with intent to sell cocaine base. Manuel Navarro's (*id.* at 20) record of violence includes two counts of assault with a deadly weapon (an ax). When the government offered him a second chance at parole, he committed rape. Mario Moreno-Pena's (*id.* at 28) difficulty in obtaining release was no doubt attributable both to his multiple convictions for a broad array of drug offenses and robbery, including a 128-month sentence for cocaine trafficking, and his violation of parole and re-parole conditions (including engaging in assaultive behavior).

to repatriate its own nationals. In any event, respondent and his amici have not demonstrated that any established norm of international law either precludes the continued exclusion of criminal aliens from a country or compels the re-release of excluded recidivist criminals who have proven themselves unwilling to adhere to reasonable release conditions. See *Al-Kateb* v. *Godwin*, No. A253/2003, 2004 WL 1747386 (Australia Aug. 6, 2004) (rejecting challenge to statute under which administrative detention of unlawful aliens is mandatory until they are granted a visa or removed, even if their removal is not foreseeable).[7]

### D. The Existing Parole Regulations Adequately Protect The Aliens' Interests

Respondent argues (Br. 46-50) that the existing parole system fails to protect adequately his constitutionally protected liberty interest in being released from detention into the United States. But respondent has no such liberty interest. Aliens stopped at the border and ordered removed have no due process right not to be subject to continued exclusion and the detention necessary to effect that exclusion. They have no due process right to release into the United States at all. The ability of the national government to determine that an alien stopped at the border has no right to enter and no right to be physically present within the United States in any form is both "inherent in sovereignty" and "essential to self-preservation." *Ekiu* v. *United States*, 142 U.S. 651, 659 (1892). The alien ordered excluded has no right to due process in that exclusion determination, no matter how long the

[7] See also *Jean*, 727 F.2d at 964 ("For centuries, it has been an accepted maxim of international law that the power to control the admission of foreigners is an inherent attribute of national sovereignty."). Amici's reliance (Cuban Bar Br. 14) on the decision of the Inter-American Commission on Human Rights is misplaced. The United States is not a party to the Inter-American Convention on Human Rights and has rejected the Commission's non-binding decision. See http://www.iachr.org/Respuestas/USA.9903.htm.



order of exclusion remains in effect. This Court has recognized that fundamental rule of law for more than a century. See U.S. Br. 16-20 (citing cases). The recalcitrance of foreign governments cannot change that.[8]

Accordingly, the constitutional starting point for aliens, like respondent, who were stopped at the border, paroled, had their parole revoked, and were subjected to a final order of removal, is custody, not liberty. Respondent has never been and claims no right to be free of federal custody. Indeed, aliens stopped at the border "are always in some form of custody." *Flores*, 507 U.S. at 302 (quoting *Schall* v. *Martin*, 467 U.S. 253, 265 (1984)). The due process interest asserted here thus is not against the deprivation of pre-existing liberty; it is in "being denied a conditional liberty" —a particular form of custody—"that one desires." *Greenholtz* v. *Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 9 (1979). Even for persons lawfully present in the United States, the Due Process Clause affords minimal protection to the "natural desire" of those lawfully detained to be released on parole. *Id.* at 7. As long as the government provides an opportunity to be heard and an explanation of the grounds for denial, which the government's parole regulations do, U.S. Br. 45, that is all "the process that is due" to *citizens* under the Constitution, *id.* at 16, and thus perforce is sufficient to satisfy the due process right that respondent mistakenly claims.

Respondent insists (Br. 49) that the government should bear the burden of proving that detention—continued exclusion—is warranted. But, at the border, the burden is on the alien to demonstrate "clearly and beyond doubt" a right to admission, 8 U.S.C. 1229a(c)(2), 1361, or to obtain a discre-

[8] Repatriation efforts with Cuba are ongoing. A total of 1688 aliens have been returned. We have been informed by the Department of Homeland Security that ten have been returned since the government filed its opening brief in this case.

tionary exercise of the parole authority. When respondent's criminal activity resulted in his parole revocation, he was, by force of law, placed in the same legal position as when he first arrived at the border. 8 U.S.C. 1182(d)(5)(A). Respondent makes no effort to explain why his personal choice to use the discretionary gift of parole to commit multiple crimes in the United States should enhance his due process rights.[9]

Respondent argues (Br. 47-48) that the foreseeability of removal and the length of detention must weigh in favor of parole. In the immigration context, however, the prospect of removal and the length of detention are functions of two things: the lack of cooperation by foreign governments and the criminal misbehavior of the alien when detained and when previously paroled. It would be perverse for either the foreign governments' resistance or the alien's misconduct to enhance an alien's rights under the Constitution after he has been ordered excluded by the Political Branches.

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For the foregoing reasons, and for those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
*Acting Solicitor General*

SEPTEMBER 2004

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[9] Importantly, respondent does not challenge the process he received when his order of removal was entered. And the criminal convictions that underlie his parole revocation and continued detention were obtained in criminal trials pursuant to the most vigorous due process protections. Amici Nat'l Refugee Orgs. is wrong to suggest that the Mariel Cubans were admitted, de facto or de jure, as refugees. *Garcia-Mir* v. *Meese*, 788 F.2d 1446, 1452 (11th Cir.), cert. denied, 479 U.S. 889 (1986); *In re M/V Solemn Judge*, 18 I. & N. Dec. 186, 191 (BIA 1982). If any of the aliens before this Court wished to challenge their legal status under the immigration law, the appropriate forum in which to do so was their removal proceedings.